

**BOARD OF PATENT APPEALS AND INTERFERENCES  
IN THE UNITED STATES PATENT AND TRADEMARK OFFICE**

Applicants : Stuart A. Fraser et al.  
Application No. : 10/829,119 Confirmation No. : 6481  
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For : SYSTEMS AND METHODS FOR TRADING  
Group Art Unit : 3692  
Examiner : Ann E. Loftus

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Commissioner for Patents  
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**APPEAL BRIEF UNDER 37 C.F.R. § 41.37**

Sir:

This is an appeal from the decision of Examiner Loftus, Group Art Unit 3692, in the Final Office Action of June 18, 2008 (hereinafter, "Final Office Action"), rejecting claims **38, 41, 45-47, 50-54, 56-59, 62-68, and 71-75** in the present application. A Notice of Appeal was filed on December 17, 2008.

This paper includes items (i) through (x) as required under 37 C.F.R. § 41.37(c)(1) and M.P.E.P. § 1205.

Applicants herewith request a five-month extension of time, which extends the time to file this paper to July 21, 2009.

The Commissioner is hereby authorized to charge (i) the Appeal Brief filing fee as set forth in 37 C.F.R. § 41.20(b)(2) of \$540.00, (ii) and the five-month extension of time fee as set forth in 37 C.F.R. § 1.17(a)(5) of \$2350.00, as well as any additional fees which may be required, or credit any overpayment, to Deposit Account No. 50-3938.

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**I. REAL PARTY IN INTEREST**

The real party in interest of the present application is BGC Partners, Inc., a corporation organized and existing under the laws of the State of Delaware, U.S.A., and having a place of business at 499 Park Avenue, New York, NY 10022.

**II. RELATED APPEALS AND INTERFERENCES**

There are no known related appeals or interferences.

### **III. STATUS OF CLAIMS**

The following claims are pending and stand rejected in the present application:

- Independent claims **38, 58, and 67.**
- Dependent claims **41, 45-47, 50-54, 56-57, 59, 62-66, 68, and 71-75.**

The following claims were previously cancelled:

- Claims **1-37, 39-40, 42-44, 48-49, 55, 60-61, and 69-70.**

The following claims are being appealed:

- Independent claims **38, 58, and 67.**
- Dependent claims **41, 45-47, 50-54, 56-57, 59, 62-66, 68, and 71-75.**

**IV. STATUS OF AMENDMENTS**

No amendments have been filed after the Final Office Action of June 18, 2008.



**V. SUMMARY OF CLAIMED SUBJECT MATTER****Independent Claim 38**

Independent claim **38** is directed at an apparatus that comprises at least one computing device having control logic associated therewith. *See, e.g., Specification* p. 3, line 17 to p. 5, line 8; p. 7, lines 14-30; p. 8, lines 11-14; p. 9, lines 6-20; Fig. 1, element 108; Fig. 2, element 206; Fig. 3, element 316. The control logic, when executed by the computing device, makes the computing device operable to receive from a first participant an order for an item, and to make the order available to at least a second participant for at least a predetermined period of time such that the second participant has the ability to trade against the order during at least the predetermined period of time. *See, e.g., Specification* p. 20, line 16 to p. 21, line 3; p. 25, line 32 to p. 26, line 2; p. 37, line 26 to p. 38, line 4; Fig. 3, element 316. The control logic, when executed by the computing device, also makes the computing device operable to receive from the first participant a command to cancel the order. *See, e.g., Specification* p. 26, line 33 to p. 27, line 8; p. 35, lines 13-14. The control logic, when executed by the computing device, further makes the computing device operable to determine that the command to cancel is received after the predetermined period of time, and to cancel the order based at least in part on determining that the command to cancel is received after the predetermined period of time. *See, e.g., Specification* p. 37, line 26 to p. 38, line 4; Fig. 3, element 316. The control logic, when executed by the computing device, also makes the computing device operable to determine that the command to cancel is received during the predetermined period of time, and not cancel the order based at least in part on determining that the command to cancel is received during the predetermined period of time. *See, e.g., Specification* p. 37, line 26 to p. 38, line 4; Fig. 3, element 316.

**Independent Claim 58**

Independent claim **58** is directed at an apparatus that comprises at least one computing device having control logic associated therewith. *See, e.g., Specification* p. 3, line 17 to p. 5, line 8; p. 7, lines 14-30; p. 8, lines 11-14; p. 9, lines 6-20; Fig. 1, element 108; Fig. 2, element 206; Fig. 3, element 316. The control logic, when executed by the computing device, makes the computing device operable to receive from a first participant an order for an item, and to make the order available to at least a second participant for at least a predetermined period of time such

that the second participant has the ability to trade against the order during at least the predetermined period of time. *See, e.g., Specification* p. 20, line 16 to p. 21, line 3; p. 25, line 32 to p. 26, line 2; p. 37, line 26 to p. 38, line 4; Fig. 3, element 316. The control logic, when executed by the computing device, also makes the computing device operable to receive from the first participant a command to cancel the order. *See, e.g., Specification* p. 26, line 33 to p. 27, line 8; p. 35, lines 13-14. The control logic, when executed by the computing device, further makes the computing device operable to determine, in response to the command to cancel, that the predetermined period of time has lapsed or that the predetermined period of time has not lapsed. *See, e.g., Specification* p. 37, line 26 to p. 38, line 4; Fig. 3, element 316. The control logic, when executed by the computing device, also makes the computing device operable to cancel the order based at least in part on determining that the predetermined period of time has lapsed, and to not cancel the order based at least in part on determining that the predetermined period of time has not lapsed. *See, e.g., Specification* p. 37, line 26 to p. 38, line 4; Fig. 3, element 316.

#### **Independent Claim 67**

Independent claim **67** is directed at an apparatus that comprises at least one computing device having control logic associated therewith. *See, e.g., Specification* p. 3, line 17 to p. 5, line 8; p. 7, lines 14-30; p. 8, lines 11-14; p. 9, lines 6-20; Fig. 1, element 108; Fig. 2, element 206; Fig. 3, element 316. The control logic, when executed by the computing device, makes the computing device operable to receive from a first participant an order for an item, and to make the order available to at least a second participant for at least a predetermined period of time such that the second participant has the ability to trade against the order during at least the predetermined period of time. *See, e.g., Specification* p. 20, line 16 to p. 21, line 3; p. 25, line 32 to p. 26, line 2; p. 37, line 26 to p. 38, line 4; Fig. 3, element 316. The control logic, when executed by the computing device, also makes the computing device operable to receive from the first participant a command to cancel the order. *See, e.g., Specification* p. 26, line 33 to p. 27, line 8; p. 35, lines 13-14. The control logic, when executed by the computing device, further makes the computing device operable to determine, in response to the command to cancel, that the order has been made available to the at least second participant for at least the predetermined period of time or that the order has not been made available to the at least second participant for

at least the predetermined period of time. *See, e.g.,* Specification p. 37, line 26 to p. 38, line 4; Fig. 3, element 316. The control logic, when executed by the computing device, also makes the computing device operable to cancel the order based at least in part on determining that the order has been made available to the at least second participant for at least the predetermined period of time, and to not cancel the order based at least in part on determining that the order has not been made available to the at least second participant for at least the predetermined period of time. *See, e.g.,* Specification p. 37, line 26 to p. 38, line 4; Fig. 3, element 316.

**VI. GROUND OF REJECTION TO BE REVIEWED ON APPEAL**

The grounds of rejection to be reviewed on appeal are whether:

- Independent claims **38, 58, and 67** and dependent claims **41, 45-46, 52, 57, 59, 64, 68, and 73** are unpatentable under 35 U.S.C. § 103(a) over Wiseman, U.S. Patent No. 5,168,446 (hereinafter, Wiseman) in view of Vojtech Menzl, “Czech Republic - Environmental Protection Equipment,” July 13, 1995 (hereinafter, Menzl);
- Dependent claims **51, 53-54, 63, 65-66, 72, and 74-75** are unpatentable under 35 U.S.C. § 103(a) over Wiseman and Menzl in view of Bay, U.S. Patent No. 5,347,452 (hereinafter, Bay); and
- Dependent claim **47** is unpatentable under 35 U.S.C. § 103(a) over Wiseman and Menzl in view of Official Notice.

## VII. ARGUMENT

### A. Summary of Argument

Independent claims **38, 58, and 67** are rejected under 35 U.S.C. § 103(a) as being unpatentable over Wiseman in view Menzl. Final Office Action, pp. 4-6. However, the Examiner fails to show that the cited references teach or suggest all the limitations of these claims. In particular, the Examiner makes numerous conclusory assertions that have absolutely no basis in the cited references themselves, or in any other evidence of record. The Examiner also makes arguments that are contradicted by and/or not supported by the teachings of Wiseman and Menzl. The Examiner also fails to address all the limitations of claims **58 and 67**. In addition, the Examiner fails to provide any evidence for the motivation to combine and modify Wiseman with Menzl. Since motivation to modify is a factual finding, it must be supported by some evidence. For at least these reasons, the Examiner fails to establish a *prima facie* case of obviousness of independent claims **38, 58, and 67**. The rejection of these claims (and claims **41, 45-47, 50-54, 56-57, 59, 62-66, 68, and 71-75**, which depend there from) is thereby improper.

Dependent claims **51, 53-54, 63, 65-66, 72, and 74-75** are rejected under 35 U.S.C. § 103(a) as being unpatentable over Wiseman and Menzl in view of Bay. Final Office Action, p. 7. However, the Examiner fails to show that the cited references teach or suggest all the limitations of these claims. In particular, the Examiner ignores claim limitations, making reference to features not recited by the claims. The Examiner also makes conclusory assertions that have absolutely no basis in the cited references themselves, or in any other evidence of record. The Examiner also makes arguments that are contradicted by and/or not supported by the teachings of Wiseman and Bay. In addition, the Examiner fails to provide any evidence for the motivation to combine and modify Wiseman with Bay. For at least these reasons, the Examiner fails to establish a *prima facie* case of obviousness of dependent claims **51, 53-54, 63, 65-66, 72, and 74-75**. The rejection of these claims is thereby improper.

Dependent claim **47** is rejected under 35 U.S.C. § 103(a) as being unpatentable over Wiseman and Menzl in view of Official Notice. However, the Examiner fails to show that the cited references teach or suggest all the limitations of these claims. In particular, assuming the Examiner is relying at all on officially-noted subject matter as the state of the prior art, officially-noted subject matter cannot be used as the basis for a rejection under Section 103. In addition, the Examiner fails to provide any evidence for the motivation to combine and modify Wiseman

with alleged known features. For at least these reasons, the Examiner fails to establish a *prima facie* case of obviousness of claim 47. The rejection of this claim is thereby improper.

## **B. Legal Standard for Obviousness**

If examination at the initial stage does not produce a *prima facie* case of obviousness, then without more the Applicants are entitled to grant of the patent. *In re Oetiker*, 977 F.2d 1443, 1445 (Fed. Cir. 1992).

To reject claims under 35 U.S.C. § 103, an Examiner must show an unrebutted *prima facie* case of obviousness. *In re Rouffet*, 149 F.3d 1350, 1355 (Fed. Cir. 1998). To establish *prima facie* obviousness of a claimed invention, all the claim limitations must be taught or suggested by the prior art. *In re Royka*, 490 F.2d 981 (CCPA 1974). If the Examiner fails to establish a *prima facie* case of obviousness, the rejection is improper and will be overturned. *In re Rijckaert*, 9 F.3d 1531, 1532 (Fed. Cir. 1993); *Novamedix Distrib. Ltd. v. Dickinson*, 175 F.Supp. 2d 8, 9 (D.D.C. 2001).

In addition, there must be some suggestion or motivation, either in the references themselves or in the knowledge generally available to one of ordinary skill in the art, to modify a reference.

*Graham v. John Deere Co.* requires that there be motivation. *Graham v. John Deere Co.*, 383 U.S. 1 (1966). This motivation does not exempt from the requirement of *Lee* and *Zurko* to have the finding be supported by substantial evidence. *In re Lee*, 277 F.3d 1338, 1342 (Fed. Cir. 2002); *In re Zurko*, 258 F.3d 1379, 1383-1386 (Fed. Cir. 2001). Thus, the Examiner must support with substantial evidence of record a factual finding of a suggestion or motivation to modify a reference. *Novamedix Distrib.*, 175 F. Supp. 2d at 9; *In re Zurko*, 258 F.3d at 1383-1386 (Fed. Cir. 2001); *In re Lee*, 277 F.3d at 1342 (Fed. Cir. 2002).

Although the teachings, suggestions, or motivations need not always be written references, the obviousness test must proceed on the basis of *some* substantial evidence of record. See *Ortho-McNeil Pharmaceutical v. Mylan Labs*, 520 F.3d 1358, 1365 (Fed. Cir. 2008).

Although an obviousness analysis need not seek out precise teachings directed to the specific subject matter of the challenged claim, the rejection of a patent on obviousness grounds cannot be sustained by mere conclusory statements. *KSR Int'l Co. v. Teleflex, Inc.*, 127 S.Ct. 1727, 1741 (2007). There must be some articulated reasoning with some rational underpinning

to support a legal conclusion of obviousness. *Id.* A patent composed of several elements is not proved obvious merely by demonstrating that each of its elements was, independently, known in the prior art. KSR Int'l Co., 127 S.Ct. at 1741. It is important to identify a reason that would have prompted a person of ordinary skill in the relevant field to combine the elements in the way the claimed invention does, since claimed discoveries almost of necessity will be combinations of what, in some sense, is already known. *Id.* A factfinder must be aware of the distortion caused by hindsight bias and must be cautious of arguments reliant upon *ex post* reasoning. KSR Int'l Co., 127 S.Ct. at 1742.

**C. Rejection Under 35 U.S.C. § 103(a) over Wiseman in view of Menzl**

**1. First Group: Claims 38, 41, 45-47, 50-54, and 56-57 – No *Prima Facie* Showing of Obviousness**

**a. *No showing that the cited references disclose “make the order available ... for at least a predetermined period of time ...,” as recited by claim 38.***

The Examiner fails to show that all the limitations of independent claim **38** are taught or suggested by the cited references.

Independent claim **38** recites in part:

*make the order available to at least a second participant for at least a predetermined period of time such that the second participant has the ability to trade against the order during at least the predetermined period of time.*

Neither Wiseman nor Menzl discloses or suggests such limitations. Nor has the Examiner argued otherwise.

Specifically, in rejecting claim **38** regarding the above limitations, the Examiner concedes that Wiseman does not “address making the order available during at least the predetermined period of time.” Final Office Action, pp. 3, 5. On the contrary, the Examiner states that Menzl discloses such features, arguing:

Menzl teaches in section 5.4.1, [an evaluation time, defined as] a time period during which bidders are bound with their offers. A person of ordinary skill in the art would understand this to mean that if their offer is accepted during this time, they must honor it. *It is implicit that accepting the offer to make a deal is possible during this time and that it is not possible for the bidder to cancel during this time. Id.* (emphasis added).

In other words, the Examiner's argument that Menzl discloses "making the order available during at least the predetermined period of time" is based on the assertion that it is implicit (i.e., Menzl would suggest to a person of ordinary skill in the art<sup>1</sup>) that "it is not possible for the bidder to cancel [an offer] during [the evaluation] time." *Id.* The Examiner's argument is flawed in that the Examiner's assertions are in direct contrast to the teachings of Menzl, and are conclusory, unsupported by any evidence of record.

Specifically Menzl discloses:

Guarantee is forfeited if an applicant, in contradiction to this Act or the tender conditions, *canceled* or changed *his bid* or did not meet the obligation to sign the contract *during the standard or extended evaluation time*. Menzl, p. 27 (emphasis added).

As shown, Menzl discloses that a bid/order *may be* canceled during the evaluation time, which directly contradicts the Examiner's assertion that "it is not possible for the bidder to cancel during this time." Accordingly, the Examiner's argument as to why Menzl discloses/suggests "making the order available during at least the predetermined period of time" is not supported by, and contradicts, Menzl.

In addition, even if one disregards such contradictory disclosure of Menzl, the Examiner's argument is still flawed in that the Examiner fails to provide any evidence within the record that "a time period during which bidders are bound with their offers," as disclosed by Menzl, would suggest to a person of ordinary skill in the art "that it is not possible for the bidder to cancel during this time," as the Examiner alleges. Final Office Action, pp. 3, 5. All factual findings of the Patent and Trademark Office must be supported by substantial evidence. On the contrary, the Examiner's assertion is purely conclusory. Furthermore, the Examiner fails to provide any evidence, let alone reasoning, as to why a person of ordinary skill in the art would be motivated to modify Menzl such that it is not possible for the bidder to cancel during the evaluation time.

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<sup>1</sup> The Examiner uses the word implicit "to explain what the reference would have suggested to a person of ordinary skill in the art at the time of the invention." Final Office Action, p. 2.



Furthermore, Applicants are not arguing that claim 38 recites “that it is not possible for the bidder to cancel during this time.”<sup>2</sup> Applicants are merely quoting the Examiner’s argument, and noting that the Examiner’s argument contradicts Menzl and is purely conclusory.

Because the Examiner’s argument both contradicts Menzl and is purely conclusory, unsupported by any evidence of record, the Examiner fails to show that Menzl discloses “making the order available during at least the predetermined period of time,” features that the Examiner concedes are also not disclosed by Wiseman. See Final Office Action, pp. 3, 5.

Finally, regarding the Examiner’s terse and conclusory comment that the proposal stage of Wiseman “could represent a period of time by itself,” Final Office Action, p. 3, in the event the Examiner is asserting that Wiseman does disclose “making the order available during at least the predetermined period of time,” the Examiner fails to provide any evidence of record as to why a person of ordinary skill in the art would make this conclusion. Again, all factual findings of the Patent and Trademark Office must be supported by substantial evidence.

Because the Examiner fails to show that all the limitations of independent claim 38 are taught or suggested by Wiseman and Menzl, the Examiner fails to establish a *prima facie* case of obviousness with respect to this claim. The rejection of claim 38 (and claims 41, 45-47, 50-54, and 56-57, which depend there from) is thereby improper.

***b. No support for the motivation to combine and modify Wiseman with Menzl.***

The alleged motivation proffered by the Examiner for combining and modifying Wiseman with Menzl has absolutely no basis in the cited references themselves, or in any other evidence of record. All factual findings of the Patent and Trademark Office must be supported by substantial evidence. Since motivation to combine and modify is a factual finding, it must be supported by some evidence. The Examiner fails to provide any evidence to support the proffered motivation to combine and modify Wiseman with Menzl.

As discussed under subsection **VII.C.1.a.**, the Examiner concedes that Wiseman does not disclose “making the order available during at least the predetermined period of time,” but rather, argues Menzl discloses such missing features. Final Office Action, pp. 3, 5. The Examiner

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<sup>2</sup> In response to Applicant’s Submission of April 21, 2008, the Examiner states “that the features upon which applicant relies (i.e., ‘that it is not possible for the bidder to cancel during this time’) are not recited in the rejected claim(s).” Final Office Action, p. 2.

further argues that one of ordinary skill in the art would be motivated to modify Wiseman to incorporate such alleged features of Menzl for the following reason:

It would have been obvious to a person of ordinary skill in the art at the time of the invention to modify Wiseman to add making the order available during at least the predetermined period of time such that the second participant has the ability to trade against the order for at least the period of time *in order to ensure that the second participant has an adequate chance to decide and prepare an acceptance. By using a predetermined period of time, all parties will know when a cancel is allowed and can act accordingly.* Final Office Action, pp. 3, 5 (emphasis added).

The Examiner's proffered motivation lacks substantial evidence within the record. The Examiner fails to cite any references or any other evidence for why a person of ordinary skill in the art would wish to selectively modify Wiseman to add "making the order available during at least the predetermined period of time such that the second participant has the ability to trade against the order for at least the period of time," in order to achieve the claimed invention. *Id.*

Nor is there any evidence for why one of ordinary skill in the art would have, at the time of the invention, known or desired to combine and modify Wiseman with Menzl in order (i) "to ensure that the second participant has an adequate chance to decide and prepare an acceptance," or to ensure that (ii) "all parties will know when a cancel is allowed and can act accordingly," as the Examiner alleges. *Id.*

Furthermore, even if a person of skill in the art had the desire "to ensure that the second participant has an adequate chance to decide and prepare an acceptance," and/or had the desire to ensure that "all parties will know when a cancel is allowed and can act accordingly," there is still no evidence that such a person would have sought to accomplish this goal by "making the order available during at least the predetermined period of time such that the second participant has the ability to trade against the order for at least the period of time," as the Examiner alleges. *Id.*

The Examiner's conclusory assertions concerning a motivation to combine and modify Wiseman with Menzl provide no evidence or support whatsoever. Thus, the Examiner fails to establish a *prima facie* case of obviousness of independent claim **38**. The rejection of claim **38** (and claims **41**, **45-47**, **50-54**, and **56-57**, which depend there from) is thereby improper.

Since there has been no evidence offered, and no reasoning based on evidence, for a motivation to combine and modify the cited references in the manner the Examiner proposes,

Applicants cannot address the obviousness rejection, and moreover Applicants need not address the obviousness rejection since a *prima facie* showing of obviousness has not been made.

- c. ***No showing that the cited references disclose “determine that the command to cancel is received after the predetermined period of time ...,” as recited by claim 38.***

The Examiner fails to show that all the limitations of independent claim **38** are taught or suggested by the cited references.

Independent claim **38** further recites in part:

*determine that the command to cancel is received after the predetermined period of time;*

*cancel the order based at least in part on determining that the command to cancel is received after the predetermined period of time;*

*determine that the command to cancel is received during the predetermined period of time; and*

*not cancel the order based at least in part on determining that the command to cancel is received during the predetermined period of time.*

Neither Wiseman nor Menzl discloses or suggests such limitations. Nor has the Examiner argued otherwise.

Specifically, in rejecting claim **38** regarding the above limitations, the Examiner raises two arguments (referred to herein as “The Examiner’s First Argument” and “The Examiner’s Second Argument”) as to why such limitations are disclosed/suggested by Wiseman. Both arguments are flawed in that the arguments are based on purely conclusory assertions, unsupported by the Examiner with any evidence of record. All factual findings of the Patent and Trademark Office must be supported by substantial evidence. Because the Examiner’s arguments are conclusory and thereby flawed, the Examiner fails to show that Wiseman discloses or suggests the above limitations of claim **38**.

#### **i. The Examiner’s First Argument**

In rejecting claim **38** regarding the above limitations, the Examiner argues:

Wiseman teaches in col 19 lines 35-55 a period of time during which a cancel command is inoperative. *In this case, the period of time is from*

*the beginning of the proposal state until the proposal is changed.* While the length of the period is not given as a number of time units, the period is still predetermined in that it is specifically planned beforehand and specified as bounded by events, rather than a timer. *When a period of time is bounded by events, and the terminating event is determined to have occurred, it is implicit that the period is determined to have terminated.* Final Office Action, pp. 5-6 (emphasis added).

In other words, the Examiner argues that Wiseman column 19, lines 35-55 would suggest to a person of ordinary skill in the art<sup>3</sup> that “the beginning of the proposal state” and “the proposal is changed” define a predetermined period of time and that when the proposal is changed, this alleged “period is determined to have terminated.” *Id.*

The Examiner’s argument is purely conclusory and thereby flawed. All factual findings of the Patent and Trademark Office must be supported by substantial evidence. On the contrary, the Examiner fails to provide any evidence within the record as to why a person of ordinary skill in the art would conclude from the cited portions of Wiseman that “the beginning of the proposal state” and “the proposal is changed” define a predetermined period of time, let alone that when the proposal is changed, a “period is determined to have terminated,” as the Examiner alleges. *Id.* More specifically, merely determining that an event has occurred (“the proposal is changed”), does not disclose, let alone suggest, “that [a] period is determined to have terminated,” and the Examiner fails to provide any evidence that a person of ordinary skill in the art would interpret and/or understand Wiseman differently. Furthermore, the Examiner fails to provide any evidence, let alone reasoning, as to why a person of ordinary skill in the art would be motivated to modify Wiseman to determine that a period of time has terminated.

In continuing with the above argument, the Examiner further asserts:

Further, as Wiseman teaches that a command to cancel is handled differently during this period, *it is implicit to determine whether the command to cancel was received during or after the period in order to handle it correctly.* It would have been obvious to a person of ordinary skill in the art at the time of the invention *to interpret Wiseman to add determining that the command to cancel is received during or after the predetermined period of time.* Final Office Action, p. 6 (emphasis added).

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<sup>3</sup> The Examiner uses the word implicit “to explain what the reference would have suggested to a person of ordinary skill in the art at the time of the invention.” Final Office Action, p. 2.

In other words, the Examiner appears to be arguing:

1. that Wiseman column 19, lines 35-55 would suggest to a person of ordinary skill in the art that Wiseman is “determin[ing] whether the command to cancel was received during or after the period of time in order to handle it correctly,” or
2. that it would be obvious for a person of ordinary skill in the art to modify Wiseman to add “determining that the command to cancel is received during or after the predetermined period of time.” *Id.*

Regardless of which argument the Examiner is attempting to make, both arguments are purely conclusory and thereby flawed. Specifically, the Examiner fails to provide any evidence within the record as to why a person of ordinary skill in the art would conclude from the cited portions of Wiseman that Wiseman is “determin[ing] whether the command to cancel was received during or after the period of time,” as the Examiner alleges. *Id.*

Similarly, the Examiner fails to cite any references or any other evidence for why a person of ordinary skill in the art would wish to selectively modify Wiseman to add “determining that the command to cancel is received during or after the predetermined period of time,” in order to achieve the claimed invention. *Id.* Nor is there any evidence for why one of ordinary skill in the art would have, at the time of the invention, known or desired to modify Wiseman in order “to handle a [cancel command] correctly,” as the Examiner alleges. *Id.* Furthermore, even if a person of skill in the art had the desire “to handle a [cancel command] correctly,” there is still no evidence that such a person would have sought to accomplish this goal by “determining that the command to cancel is received during or after the predetermined period of time,” as the Examiner alleges. *Id.*

Finally, the portion of Wiseman column 19 to which the Examiner refers reads in part:

However, a transaction that has reached the proposal stage can still be canceled if the proposal is CHANGED and one of the parties touches CANCEL twice before a new proposal is received. Wiseman column 19, lines 42-46.

Contrary to the Examiner’s numerous unfounded assertions, nothing in this portion of Wiseman makes any reference to, or suggests, a “predetermined period of time,” that a “period is determined to have terminated,” or “determining that the command to cancel is received during or after the predetermined period of time,” as the Examiner alleges. Final Office Action, pp. 5-6. At most, Wiseman discloses that upon entering the proposal stage, the permitting of a cancel

command is based on whether a change command has been issued. However, such features do not disclose or suggest, “*determine[ing] that the command to cancel is received after the predetermined period of time; cancel[ing] the order based at least in part on determining that the command to cancel is received after the predetermined period of time; determine[ing] that the command to cancel is received during the predetermined period of time; and not cancel[ing] the order based at least in part on determining that the command to cancel is received during the predetermined period of time*” as claim 38 recites. Nor has the Examiner argued otherwise.

Because the Examiner’s arguments are purely conclusory, unsupported by any evidence of record, the Examiner fails to show that Wiseman discloses or suggests the above limitations of claim 38. Because the Examiner fails to show that all the limitations of independent claim 38 are taught or suggested by Wiseman (or Menzl), the Examiner fails to establish a *prima facie* case of obviousness with respect to this claim. The rejection of claim 38 (and claims 41, 45-47, 50-54, and 56-57, which depend there from) is thereby improper.

## **ii. The Examiner’s Second Argument**

In further rejecting claim 38 regarding the above limitations, the Examiner argues:

(i) In col 19 lines 35-55 Wiseman teaches a trading system with a cancel command. Wiseman teaches that a command to cancel will effectively cancel a transaction out side the proposal stage, and that a proposal stage transaction cannot be cancelled unless the proposal is changed. Wiseman col 4 lines 10-15 teaches that changing the proposal is an optional embodiment, thus suggesting a system where transactions in the proposal stage cannot be cancelled, which simplifies matters. Thus Wiseman teaches receiving from the first participant a command to cancel the order, and canceling the order if it is not a proposal stage. *This would suggest to a person of ordinary skill in the art that after receiving a command to cancel, the system determines whether it is in a proposal stage or not. The system will cancel the order based at least in part on determining that the command to cancel was received outside the proposal stage, and not cancel the order based at least in part on determining that the command to cancel is received during the proposal stage.* The proposal stage could represent a period of time by itself, or Wiseman could be modified in view of Menzl teaching a period of time as above.

(ii) The claim language includes the word after; this further specifies that cancellation occurs after the period of time, which is a slightly different arrangement of the features taught by Wiseman. Wiseman teaches a cancel command followed by cancellation and a time when cancellation is not implemented. All of the component features are taught by the art as applied

above. The only difference is the claim recites the combination of known features in a specific order – *Wiseman teaches a cancellation followed by a proposal stage where cancellation is not implemented, and the claim recites a period without cancellation followed by a period with cancellation. Combining the features in this order would pose no particular challenges to a person of ordinary skill in the art. The features would perform essentially the same function as they do in Wiseman's arrangement. The combination would have predictable results and a reasonable expectation of a successful combination.*

(iii) Thus it would have been obvious to a person of ordinary skill in the art at the time of the invention to modify Wiseman to arrange the features such that the command to cancel is received after the period of time, and the order is cancelled, forming a combination of known elements by known methods to yield predictable results, *in order to prevent the first participant from being bound to an out dated deal.* Final Office Action, pp. 3-4 (emphasis added).

Again, the Examiner's arguments are flawed in that the arguments are based on numerous conclusory assertions that have absolutely no basis in the cited references themselves, or in any other evidence of record. All factual findings of the Patent and Trademark Office must be supported by substantial evidence.

Specifically, regarding the Examiner's statements made in the first (i) noted subsection regarding, "[t]his would suggest to a person of ordinary skill in the art that ..., " the Examiner fails to provide any evidence as to why a person of ordinary skill in the art would conclude, interpret, and/or understand Wiseman to operate in the manner the Examiner asserts. *Id.* The portion of Wiseman on which the Examiner draws such conclusions reads in part,

The CANCEL field can be used to terminate any communication link at any stage of a transaction, provided the transaction is not in the proposal state (where a proposal has been sent) or any subsequent stage. However, a transaction that has reached the proposal stage can still be canceled if the proposal is CHANGED and one of the parties touches CANCEL twice before a new proposal is received." Wiseman col. 19, lines 39-46.

Contrary to the Examiner's unsubstantiated conclusions, nothing in this portion of Wiseman makes any reference to, let alone suggests, "that after receiving a command to cancel, the system determines whether it is in a proposal stage or not," that the "system will cancel the order based at least in part on determining that the command to cancel was received outside the proposal stage," or that the system will "not cancel the order based at least in part on determining that the command to cancel is received during the proposal stage," as the Examiner alleges. Final Office Action, pp. 3-4. Nor does the Examiner provide any evidence, let alone reasoning,

why a person of ordinary skill of the art would conclude Wiseman operates in such a manner. *Id.* Furthermore, the Examiner fails to provide any evidence, let alone reasoning, as to why a person of ordinary skill in the art would be motivated to modify Wiseman to operate in such a manner. *Id.*

Regarding the second (ii) noted subsection above, even assuming, *arguendo*, that “Wiseman teaches a cancellation followed by a proposal stage where cancellation is not implemented, and the claim recites a period without cancellation followed by a period with cancellation,” as the Examiner alleges, the Examiner’s statements on how “[c]ombining the features in this order would pose no particular challenges to a person of ordinary skill in the art,” that the “features would perform essentially the same function as they do in Wiseman’s arrangement,” and that the “combination would have predictable results and a reasonable expectation of a successful combination,” are again purely conclusory. *Id.* There is absolutely no basis in the cited references themselves, or in any other evidence of record to support such assertions.

Similarly, regarding the Examiner’s statements made in the third (iii) noted subsection, the Examiner fails to cite any references or any other evidence for why a person of ordinary skill in the art would wish to selectively modify Wiseman to “arrange the [alleged] features [of Wiseman] such that the command to cancel is received after the period of time, and the order is cancelled,” in order to achieve the claimed invention. *Id.* Nor is there any evidence for why a person of ordinary skill in the art would have, at the time of the invention, known or desired to modify Wiseman “in order to prevent the first participant from being bound to an out dated deal,” as the Examiner alleges. *Id.* Furthermore, even if a person of skill in the art had the desire “to prevent the first participant from being bound to an out dated deal,” there is still no evidence that such a person would have sought to accomplish this goal by “arrang[ing] the [alleged] features [of Wiseman] such that the command to cancel is received after the period of time, and the order is cancelled,” as the Examiner alleges. *Id.*

Furthermore, Wiseman specifically teaches away from the Examiner’s proposed modifications. In particular, the Examiner argues that it would be obvious to modify Wiseman such that the proposal stage (“where cancellation is not implemented”) is followed by a period where cancellation is implemented. *Id.* However, Wiseman discloses that the proposal stage begins when a trader transmits a proposal to a counterparty. Wiseman, column 19, lines 39-46.



Wiseman further discloses that when no cancellations occur during the proposal stage, the counterparty “must accept the proposal,” and that acceptance of the proposal results in a “completed transaction.” Wiseman, column 4, lines 10-30; column 2, lines 37-63. Accordingly, Wiseman discloses that when no cancellations occur during the proposal stage, there are no orders left to cancel during any period thereafter because the orders have resulted in a completed transaction. Accordingly, it is illogical to modify Wiseman “to arrange the [alleged] features [of Wiseman] such that the command to cancel is received after the period of time, and the order is cancelled,” as the Examiner proposes. Final Office Action, pp. 3-4. Furthermore, Applicants note that Wiseman specifically states that the “CANCEL field can be used to terminate any communication link at any stage of a transaction, provided the transaction is not in the proposal state ... or any subsequent stage.” Wiseman, column 19, lines 39-42 (emphasis added). Accordingly, it is also in direct contrast to the teachings of Wiseman to modify Wiseman in the manner the Examiner proposes.

Because the Examiner’s arguments are purely conclusory, unsupported by any evidence of record, the Examiner fails to show that Wiseman discloses or suggests the above limitations of claim **38**. Because the Examiner fails to show that all the limitations of independent claim **38** are taught or suggested by Wiseman (or Menzl), the Examiner fails to establish a *prima facie* case of obviousness with respect to this claim. The rejection of claim **38** (and claims **41**, **45-47**, **50-54**, and **56-57**, which depend there from) is thereby improper.

*d. No showing that the cited references disclose “not cancel the order ...,” as recited by claim 38.*

The Examiner fails to show that all the limitations of independent claim **38** are taught or suggested by the cited references.

Independent claim **38** further recites in part:

*not cancel the order based at least in part on determining that the command to cancel is received during the predetermined period of time.*

Neither Wiseman nor Menzl discloses or suggests such limitations. Nor has the Examiner argued otherwise.

Specifically, regarding the above limitations of claim **38**, the Examiner argues:

The examiner wishes to note that not canceling an order is elimination of a function. Elimination of an element or its functions is deemed to be obvious in light of prior art teachings of at least the recited element or its functions (see *In re Karlson* ...). Final Office Action, p. 6.

Assuming the Examiner does not regard this point as moot<sup>4</sup> and is maintaining the rejection, Applicants again note that *Karlson* does not apply to claim 38. See Applicants Submission of April 2008, p 8. Specifically, in *Karlson* the court stated that with respect to prior art, “[i]t is well settled ... that omission of an element and its function in a combination is an obvious expedient if the remaining elements perform the same functions as before.” *In re Karlson*, 311 F.2d 581, 584 (CCPA 1963). The Examiner has not shown that the apparatus of claim 38 omits an element and its function of *Wiseman* and/or *Menzl*. More specifically, the recitation by claim 38 to “*not cancel an order* ...” is not an omission of an element and its function like that discussed in *Karlson*. As such, *Karlson* is not relevant to and does not apply to claim 38.

Because the Examiner fails to show that all the limitations of independent claim 38 are taught or suggested by *Wiseman* and *Menzl*, the Examiner fails to establish a *prima facie* case of obviousness with respect to this claim. The rejection of claim 38 (and claims 41, 45-47, 50-54, and 56-57, which depend there from) is thereby improper.

**2. Second Group: Claims 58-59 and 62-66 – No *Prima Facie* Showing of Obviousness**

**SEPARATE ARGUMENT OF PATENTABILITY**

***a. No showing that the cited references disclose “make the order available ... for at least a predetermined period of time ...,” as recited by claim 58.***

The Examiner fails to show that all the limitations of independent claim 58 are taught or suggested by the cited references.

Independent claim 58 recites in part:

*make the order available to at least a second participant for at least a predetermined period of time such that the second participant has the*

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<sup>4</sup> In response to Applicants Submission of April 2008, the Examiner states that “applicant argues that *In Re Karlson* does not apply” and that the “point is now moot because *Wiseman* teaches not cancelling an order.” Final Office Action, p. 4

*ability to trade against the order during at least the predetermined period of time;*

Neither Wiseman nor Menzl discloses or suggests such limitations. Nor has the Examiner argued otherwise.

Specifically, the above limitations of claim **58** are also recited by claim **38**. The Examiner appears to argue that such limitations of claim **58** are disclosed by Wiseman and Menzl for the same reasons set forth for claim **38**, *see* Final Office Action, pp. 3, 5, and as discussed by Applicants under subsection **VII.C.1.a**. Accordingly, Applicants repeat herein Applicants response as set forth under subsection **VII.C.1.a**.

Because the Examiner fails to show that all the limitations of independent claim **58** are taught or suggested by Wiseman and Menzl, the Examiner fails to establish a *prima facie* case of obviousness with respect to this claim. The rejection of claim **58** (and claims **59** and **62-66**, which depend there from) is thereby improper.

***b. No support for the motivation to combine and modify Wiseman with Menzl.***

Further regarding the limitations of claim **58** directed at “mak[ing] the order available ... for at least a predetermined period of time ...,” the Examiner appears to further argue that it would have been obvious for a person of skill in the art to combine and modify Wiseman with Menzl for the same reasons set forth for claim **38**, *see* Final Office Action, pp. 3, 5, and as discussed by Applicants under subsection **VII.C.1.b**. Accordingly, Applicants repeat herein Applicants response as set forth under subsection **VII.C.1.b**.

Because the Examiner’s conclusory assertions concerning a motivation to combine and modify Wiseman with Menzl provide no evidence or support whatsoever, the Examiner fails to establish a *prima facie* case of obviousness of independent claim **58**. The rejection of claim **58** (and claims **59** and **62-66**, which depend there from) is thereby improper. Since there has been no evidence offered, and no reasoning based on evidence, for a motivation to combine and modify the cited references in the manner the Examiner proposes, Applicants cannot address the obviousness rejection, and moreover Applicants need not address the obviousness rejection since a *prima facie* showing of obviousness has not been made.

**c.      *The limitations “in response to the command to cancel ...,” as recited by claim 58, are ignored.***

The Examiner fails to address all the limitations of independent claim **58** and thereby fails to show that all the limitations of claim **58** are taught or suggested by the cited references.

Independent claim **58** further recites in part:

*in response to the command to cancel, determine that the predetermined period of time has lapsed or that the predetermined period of time has not lapsed;*

*cancel the order based at least in part on determining that the predetermined period of time has lapsed; and*

*not cancel the order based at least in part on determining that the predetermined period of time has not lapsed.*

The Examiner ignores these limitations of claim **58** and as such, fails to show that these limitations are taught or suggested by the cited references. Specifically, the Examiner collectively rejects independent claims **38**, **58**, and **67**, referring only to the limitations of claim **38** even though claims **38**, **58**, and **67** recite different limitations. Final Office Action, pp. 3-6. In particular, the Examiner addresses the limitations of claim **38** directed at: “*determine that the command to cancel is received after the predetermined period of time; cancel the order ...; determine that the command to cancel is received during the predetermined period of time; and not cancel the order...*” However, the Examiner ignores the above limitations of claim **58** including, for example, the limitations: “*in response to the command to cancel, determine that the predetermined period of time has lapsed or that the predetermined period of time has not lapsed.*”

Because the Examiner fails to address at least the above limitations of claim **58**, the Examiner fails to show that these limitations are taught or suggested by the cited references. Accordingly, the Examiner fails to establish a *prima facie* case of obviousness of independent claim **58** (and claims **59** and **62-66**, which depend there from). Furthermore, since the Examiner fails to address all the limitations of claim **58**, Applicants cannot address the obviousness rejection, and moreover, Applicants need not address the obviousness rejection since a *prima facie* showing of obviousness has not been made.

Nonetheless, assuming the Examiner is rejecting claim **58** under a similar rational as claim **38** and as discussed by Applicants under subsection **VII.C.1.c.**, Applicants repeat herein Applicants response as set forth under subsection **VII.C.1.c.**, including Applicants response to “The Examiner’s First Argument” and Applicants response to “The Examiner’s Second Argument.”

In addition, particular attention is drawn to “The Examiner’s First Argument” where the Examiner states:

Wiseman teaches in col 19 lines 35-55 a period of time during which a cancel command is inoperative. *In this case, the period of time is from the beginning of the proposal state until the proposal is changed.* While the length of the period is not given as a number of units, the period is still predetermined in that it is specifically planned beforehand and specified as bounded by events, rather than a timer. *When a period of time is bounded by events, and the terminating event is determined to have occurred, it is implicit that the period is determined to have terminated.* Final Office Action, pp. 5-6 (emphasis added).

As similarly discussed under subsection **VII.C.1.c.**, merely determining that “the proposal is changed” does not disclose or suggest, “*determin[ing] that the predetermined period of time has lapsed,*” let alone disclose or suggest, “*in response to the command to cancel, determin[ing] that the predetermined period of time has lapsed,*” as recited by claim **58**. Nor has the Examiner provided any evidence that a person of ordinary skill in the art would interpret and/or understand Wiseman differently. Furthermore, the Examiner fails to provide any evidence, let alone reasoning, as to why a person of ordinary skill in the art would be motivated to modify Wiseman to add, “*in response to the command to cancel, determin[ing] that the predetermined period of time has lapsed.*” Lastly, Applicants note that the Examiner’s rejection is devoid of any discussion of, “*in response to the command to cancel, determin[ing] ... that the predetermined period of time has not lapsed,*” as recited by claim **58**.

Because the Examiner fails to show that all the limitations of independent claim **58** are taught or suggested by the cited references, the Examiner fails to establish a *prima facie* case of obviousness with respect to this claim. The rejection of claim **58** (and claims **59** and **62-66**, which depend there from) is thereby improper.

**d. No showing the cited references disclose “not cancel the order ...,” as recited by claim 58.**

The Examiner fails to show that all of the limitations of independent claim **58** are taught or suggested by the cited references.

Independent claim **58** further recites in part:

*not cancel the order based at least in part on determining that the predetermined period of time has not lapsed.*

Neither Wiseman nor Menzl discloses or suggests such limitations. Nor has the Examiner argued otherwise. In particular, similar to the rejection of claim **38**, see Final Office Action, p. 6, and as discussed under subsection **VII.C.1.d**, the Examiner appears to argue that “not cancel[ing] the order,” as recited by claim **58**, “is elimination of an element or its function.” Applicants repeat herein Applicants response as set forth under subsection **VII.C.1.d**. Because the Examiner fails to show that all the limitations of independent claim **58** are taught or suggested by Wiseman and Menzl, the Examiner fails to establish a *prima facie* case of obviousness with respect to this claim. The rejection of claim **58** (and claims **59** and **62-66**, which depend there from) is thereby improper.

**3. Third Group: Claims 67-68 and 71-75 – No Prima Facie Showing of Obviousness**

**SEPARATE ARGUMENT OF PATENTABILITY**

**a. No showing that the cited references disclose “make the order available ... for at least a predetermined period of time ...,” as recited by claim 67.**

The Examiner fails to show that all the limitations of independent claim **67** are taught or suggested by the cited references.

Independent claim **67** recites in part:

*make the order available to at least a second participant for at least a predetermined period of time such that the second participant has the ability to trade against the order during at least the predetermined period of time;*

Neither Wiseman nor Menzl discloses or suggests such limitations. Nor has the Examiner argued otherwise.

Specifically, the above limitations of claim **67** are also recited by claim **38**. The Examiner appears to argue that such limitations of claim **67** are disclosed by Wiseman and Menzl for the same reasons set forth for claim **38**, *see* Final Office Action, pp. 3, 5, and as discussed by Applicants under subsection **VII.C.1.a**. Accordingly, Applicants repeat herein Applicants response as set forth under subsection **VII.C.1.a**.

Because the Examiner fails to show that all the limitations of independent claim **67** are taught or suggested by Wiseman and Menzl, the Examiner fails to establish a *prima facie* case of obviousness with respect to this claim. The rejection of claim **67** (and claims **68** and **71-75**, which depend there from) is thereby improper.

***b. No support for the motivation to combine and modify Wiseman with Menzl.***

Further regarding the limitations of claim **67** directed at “mak[ing] the order available ... for at least a predetermined period of time ...,” the Examiner appears to further argue that it would have been obvious for a person of skill in the art to combine and modify Wiseman with Menzl for the same reasons set forth for claim **38**, *see* Final Office Action, pp. 3, 5, and as discussed by Applicants under subsection **VII.C.1.b**. Accordingly, Applicants repeat herein Applicants response as set forth under subsection **VII.C.1.b**.

Because the Examiner’s conclusory assertions concerning a motivation to combine and modify Wiseman with Menzl provide no evidence or support whatsoever, the Examiner fails to establish a *prima facie* case of obviousness of independent claim **67**. The rejection of claim **67** (and claims **68** and **71-75**, which depend there from) is thereby improper. Since there has been no evidence offered, and no reasoning based on evidence, for a motivation to combine and modify the cited references in the manner the Examiner proposes, Applicants cannot address the obviousness rejection, and moreover Applicants need not address the obviousness rejection since a *prima facie* showing of obviousness has not been made.

***c. The limitations “in response to the command to cancel ...,” as recited by claim 67, are ignored.***

The Examiner fails to address all the limitations of independent claim **67** and thereby fails to show that all the limitations of claim **67** are taught or suggested by the cited references.

Independent claim **67** further recites in part:

*in response to the command to cancel, determine that the order has been made available to the at least second participant for at least the predetermined period of time or that the order has not been made available to the at least second participant for at least the predetermined period of time;*

*cancel the order based at least in part on determining that the order has been made available to the at least second participant for at least the predetermined period of time; and*

*not cancel the order based at least in part on determining that the order has not been made available to the at least second participant for at least the predetermined period of time.*

The Examiner ignores these limitations of claim **67** and as such, fails to show that these limitations are taught or suggested by the cited references. Specifically, the Examiner collectively rejects independent claims **38**, **58**, and **67**, referring only to the limitations of claim **38** even though claims **38**, **58**, and **67** recite different limitations. Final Office Action, pp. 3-6. In particular, the Examiner addresses the limitations of claim **38** directed at: “*determine that the command to cancel is received after the predetermined period of time; cancel the order ...; determine that the command to cancel is received during the predetermined period of time; and not cancel the order...*” However, the Examiner ignores the above limitations of claim **67** including, for example, the limitations: “*in response to the command to cancel, determine that the order has been made available to the at least second participant for at least the predetermined period of time or that the order has not been made available to the at least second participant for at least the predetermined period of time.*”

Because the Examiner fails to address at least the above limitations of claim **67**, the Examiner fails to show that these limitations are taught or suggested by the cited references. Accordingly, the Examiner fails to establish a *prima facie* case of obviousness of independent claim **67** (and claims **68** and **71-75**, which depend there from). Furthermore, since the Examiner fails to address all the limitations of claim **67**, Applicants cannot address the obviousness rejection, and moreover, Applicants need not address the obviousness rejection since a *prima facie* showing of obviousness has not been made.



Nonetheless, assuming the Examiner is rejecting claim **67** under a similar rational as claim **38** and as discussed by Applicants under subsection **VII.C.1.c.**, Applicants repeat herein Applicants response as set forth under subsection **VII.C.1.c.**, including Applicants response to “The Examiner’s First Argument” and Applicants response to “The Examiner’s Second Argument.”

Because the Examiner fails to show that all the limitations of independent claim **67** are taught or suggested by the cited references, the Examiner fails to establish a *prima facie* case of obviousness with respect to this claim. The rejection of claim **67** (and claims **68** and **71-75**, which depend there from) is thereby improper.

*d. No showing that the cited references disclose “not cancel the order ...,” as recited by claim 67.*

The Examiner fails to show that all of the limitations of independent claim **67** are taught or suggested by the cited references.

Independent claim **67** further recites in part:

*not cancel the order based at least in part on determining that the order has not been made available to the at least second participant for at least the predetermined period of time.*

Neither Wiseman nor Menzl discloses or suggests such limitations. Nor has the Examiner argued otherwise. In particular, similar to the rejection of claim **38**, see Final Office Action, p. 6, and as discussed under subsection **VII.C.1.d.**, the Examiner appears to argue that “*not cancell[ing] the order*,” as recited by claim **67**, “is elimination of an element or its function.” Applicants repeat herein Applicants response as set forth under subsection **VII.C.1.d.** Because the Examiner fails to show that all the limitations of independent claim **67** are taught or suggested by Wiseman and Menzl, the Examiner fails to establish a *prima facie* case of obviousness with respect to this claim. The rejection of claim **67** (and claims **68** and **71-75**, which depend there from) is thereby improper.

**D. Rejection Under 35 U.S.C. § 103(a) over Wiseman and Menzl in view of Bay****1. Fourth Group: Claims 51, 53, 63, 65, 72, and 74 – No *Prima Facie* Showing of Obviousness****SEPARATE ARGUMENT OF PATENTABILITY**

The Fourth Group is a subset of the First Group and is therefore patentable for the reasons set forth above for the First Group. The Fourth Group is a subset of the Second Group and is therefore patentable for the reasons set forth above for the Second Group. The Fourth Group is a subset of the Third Group and is therefore patentable for the reasons set forth above for the Third Group. In addition, the following separate arguments of patentability apply.

**a. *No showing that the cited references disclose all the limitations of the claims.***

The Examiner fails to show that all the limitations of dependent claim **51, 53, 63, 65, 72,** and **74** are taught or suggested by the cited references.

Dependent claim **51** is representative of the group and recite in part:

*access, based at least on the item, at least one parameter, in which the at least one parameter comprises a setting for the predetermined period of time.*

Neither Wiseman, Menzl, nor Bay discloses or suggests such limitations. Nor has the Examiner argued otherwise.

The Examiner concedes that Wiseman, and presumably Menzl, do not “teach determining a period of time based on an item ... or a parameter.” Final Office Action, p. 7. On the contrary, the Examiner argues that Bay “teaches in col 2 lines 1-20 a period of time based on an item, and based on a parameter.” *Id.*

The Examiner’s argument is flawed for several reasons. First, the Examiner ignores the limitations of claims **51, 53, 63, 65, 72,** and **74**. In particular, the Examiner concedes that Wiseman and Menzl do not “teach determining a period of time based on an item ... or a parameter” but rather, argues Bay discloses or suggests such features. *Id.* However, the claims do not recite such limitations but rather, recite, for example, “*access, based at least on the item, at least one parameter, in which the at least one parameter comprises a setting for the predetermined period of time.*” Because the Examiner fails to even address the limitations of claims **51, 53, 63, 65, 72,** and **74**, the Examiner fails to show that all the limitations of these

claims are taught or suggested by Bay, let alone Wiseman and/or Menzl. Accordingly, the Examiner fails to establish a *prima facie* case of obviousness of dependent claims **51, 53, 63, 65, 72, and 74**. Furthermore, since the Examiner fails to address the limitations of these claims, Applicants cannot address the obviousness rejection, and moreover Applicants need not address the obviousness rejection since a *prima facie* showing of obviousness has not been made.

Second, the portion of Bay referred to by the Examiner discloses:

During intermediate time intervals, volume tends to be lower. Thus, a rise in volume at the end of a day may be a normal event and not indicative of any impending market change in the item. In order to utilize the current volume information, *Applicant has developed a histogram of volume information for each of a plurality of selected time intervals*. The histogram is displayed on a monitor of a computer system so that current trade volume can be juxtaposed with historical trade volume as trades occur. The computer system is coupled via modem to an exchange which provides pricing data as each trade occurs. Preferably, pricing information is displayed simultaneously with volume information so that an accurate assessment of market direction can be made. *The system also extrapolates to a predicted volume in a time interval for each traded item based upon the number of trades occurring during the early portions of the time interval*. Bay column 2, lines 1-20 (emphasis added).

Nothing in this portion of Bay discloses or suggests, “determining a period of time based on an item... or a parameter,” as the Examiner alleges. Final Office Action, p. 7.

More specifically, nothing in this portion of Bay discloses or suggests limitations of any of claims **51, 53, 63, 65, 72, and 74**, including, for example, “*access[ing], based at least on the item, at least one parameter, in which the at least one parameter comprises a setting for the predetermined period of time*.” More significantly, nothing in this portion of Bay has anything to do with a “*predetermined period of time*” where that “*predetermined period of time*” is with respect to “*mak[ing] the order available to at least a second participant for at least [the] predetermined period of time*.” In particular, “a histogram of volume information for each of a plurality of selected time intervals,” and a “system [that] extrapolates to a predicted volume in a time interval for each traded item based upon the number of trades occurring during the early portions of the time interval,” as disclosed by Bay, do not disclose or suggest such limitations of the claims, nor has the Examiner argued otherwise.

For at least the foregoing reasons, the Examiner fails to show that all the limitations of dependent claims **51, 53, 63, 65, 72, and 74** are taught or suggested by the cited references.

Accordingly, the Examiner fails to establish a *prima facie* case of obviousness of these claims. The rejection of these claims is thereby improper.

***b. No support for the motivation to combine and modify Wiseman with Bay.***

The alleged motivation proffered by the Examiner for combining and modifying Wiseman with Bay has absolutely no basis in the cited references themselves, or in any other evidence of record. All factual findings of the Patent and Trademark Office must be supported by substantial evidence. Since motivation to combine and modify is a factual finding, it must be supported by some evidence. The Examiner fails to provide any evidence to support the proffered motivation to combine and modify Wiseman with Bay.

As discussed under subsection **VII.D.1.a.**, the Examiner concedes that Wiseman does not “teach determining a period of time based on an item ... or a parameter” but rather, argues Bay discloses/suggest such missing features. Final Office Action, p. 7. The Examiner further argues that one of ordinary skill in the art would be motivated to modify Wiseman to incorporate such alleged features of Bay for the following reason:

It would have been obvious to a person of ordinary skill in the art at the time of the invention to modify Wiseman to include determining a period of time based on the item, a type of item or a parameter *in order to reflect the nature of each market. Id.* (emphasis added).

The Examiner’s proffered motivation lacks substantial evidence within the record. The Examiner fails to cite any references or any other evidence for why a person of ordinary skill in the art would wish to selectively modify Wiseman to include “determining a period of time based on an item ... or a parameter,” in order to achieve the claimed invention. *Id.*

Nor is there any evidence for why a person of ordinary skill in the art would have, at the time of the invention, known or desired to combine and modify Wiseman with Bay “in order to reflect the nature of each market,” as the Examiner alleges. *Id.*

Furthermore, even if a person of skill in the art had the desire “to reflect the nature of each market,” there is still no evidence that such a person would have sought to accomplish this goal by “determining a period of time based on an item ... or a parameter,” as the Examiner alleges. *Id.*

The Examiner's conclusory assertions concerning a motivation to combine and modify Wiseman with Bay provide no evidence or support whatsoever. Thus, the Examiner fails to establish a *prima facie* case of obviousness of dependent claims **51, 53, 63, 65, 72, and 74**. The rejection of these claims is thereby improper.

Since there has been no evidence offered, and no reasoning based on evidence, for a motivation to combine and modify the references in the manner the Examiner proposes, Applicants cannot address the obviousness rejection, and moreover Applicants need not address the obviousness rejection since a *prima facie* showing of obviousness has not been made.

**2. Fifth Group: Claims 54, 66, and 75 – No *Prima Facie* Showing of Obviousness**

**SEPARATE ARGUMENT OF PATENTABILITY**

The Fifth Group is a subset of the First Group and is therefore patentable for the reasons set forth above for the First Group. The Fifth Group is a subset of the Second Group and is therefore patentable for the reasons set forth above for the Second Group. The Fifth Group is a subset of the Third Group and is therefore patentable for the reasons set forth above for the Third Group. In addition, the following separate arguments of patentability apply.

**a. *No showing that the cited references disclose the limitations of the claims.***

The Examiner fails to show that all the limitations of dependent claim **54, 66, and 75** are taught or suggested by the cited references.

Dependent claim **54** is representative of the group and recites in part, together with claims **38** and **52** from which it depends:

*receive from a first participant an order for an item;*

*make the order available to at least a second participant for at least a predetermined period of time such that the second participant has the ability to trade against the order during at least the predetermined period of time; ...*

*receive a second order for a second item; ...*

*make the second order available to at least another participant for at least a second predetermined period of time such that the another participant has the ability to trade against the second order during at least the second predetermined period of time;*

*in which the predetermined period of time for the item is different from the second predetermined period of time for the second item.*

Neither Wiseman, Menzl, nor Bay discloses or suggests such limitations. Nor has the Examiner argued otherwise.

Specifically, in rejecting claims **54**, **66**, and **75**, the Examiner argues:

Wiseman teaches a period of time between the beginning of a proposal state and a change in a proposal. *It would have been obvious to a person of ordinary skill in the art at the time of the invention that this period would implicitly vary.* Thus Wiseman teaches a period of time for the item is different from the second period of time for the second item. Final Office Action, p. 7 (emphasis added).

The Examiner's argument is purely conclusory and thereby flawed. All factual findings of the Patent and Trademark Office must be supported by substantial evidence. On the contrary, the Examiner merely concludes, without providing any evidence within the record, that Wiseman discloses "a period of time between the beginning of a proposal state and a change in a proposal," and that a person of ordinary skill in the art would find it obvious "that this period would implicitly vary." *Id.* Because the Examiner's argument is purely conclusory, the Examiner fails to show that Wiseman discloses that "a period of time for the item is different from the second period of time for the second item," as the Examiner alleges. *Id.*

Furthermore, even assuming, *arguendo*, that Wiseman discloses/suggests a period of time that "var[ies]," the Examiner's rejection is illogical and contrary to the claim limitations. Specifically, claims **54**, **66**, and **75** recite, "*make the order available to at least a second participant for at least a predetermined period,*" and "*make the second order available to at least another participant for at least a second predetermined period of time.*" Applicants cannot ascertain, nor does the Examiner provide any explanation, how a varying period of time discloses, let alone suggests, a "*predetermined period of time*" and "*a second predetermined period of time.*" Furthermore, the Examiner fails to provide any evidence, let alone reasoning, as to why a person of ordinary skill in the art would be motivated to modify the alleged varying period of time of Wiseman to be "*a predetermined period of time*" and "*a second predetermined*

*period of time,” “in which the predetermined period of time ... is different from the second predetermined period of time ....”*

For at least the foregoing reasons, the Examiner fails to show that all the limitations of claims **54**, **66**, and **75** are taught or suggested by Wiseman (or Menzl and/or Bay). Accordingly, the Examiner fails to establish a *prima facie* case of obviousness of these claims. The rejection of these claims is thereby improper.

**E. Rejection Under 35 U.S.C. § 103(a) over Wiseman and Menzl in view of Official Notice**

**1. Sixth Group: Claim 47 – No *Prima Facie* Showing of Obviousness**

**SEPARATE ARGUMENT OF PATENTABILITY.**

The Sixth Group is a subset of the First Group and is therefore patentable for the reasons set forth above for the First Group. In addition, the following separate arguments of patentability apply.

**a. *Officially-noted subject matter cannot be used as the basis for a rejection.***

The Examiner improperly relies on officially-noted subject matter in rejecting dependent claim **47** and thereby fails to establish a *prima facie* case of obviousness of this claim.

Dependent claim **47** recites in part:

*in which to receive the order for the item comprises to receive on a passive side of a market the order for the item; and*

*in which the trading command comprises at least one of:  
a command to trade all of the passive side of the market,  
a hit command to trade down to a first price, and  
a lift command to trade up to a second price.*

In rejection claim **47**, the Examiner states in part:

Official Notice is taken that it is old and well-known to receive on a passive side of a market the order for the item; and in which the trading command comprises at least one of a command to trade all of the passive side of the market, a hit command to trade down to a first price, and a lift command to trade up to a second price. The Official Notice is supported by Wiseman in col 3 line 55 to col 4 line 10 teaching trading negotiations that would include a hit command to trade down to a first price and a lift command to trade up to a second price, and by US Patent 5905974 filed

12/13/96 by Fraser et al. Fraser teaches in col 12 lines 30-50. Final Office Action, pp. 7-8.

The Examiner appears to rely on some combination of officially-noted subject matter, Wiseman, and/or US Patent 5905974 to Fraser et al. as disclosing the limitations of claim **47**. *Id.* Assuming the Examiner is relying at all on officially-noted subject matter as the state of the prior art, as Applicants stated in their Submission of November 1, 2007 officially-noted subject matter cannot be used as the basis for a rejection under Section 103. See Applicants Submission of November 2007, pp. 23-24. All factual findings of the Patent and Trademark Office must be supported by substantial evidence. Assuming the Examiner is relying at all on officially-noted subject matter as the state of the prior art, the Examiner's rejection of claim **47** lacks substantial evidence support and as such, is insufficient to establish a *prima facie* case of obviousness. The rejection of claim **47** is thereby improper.

***b. No support for the motivation to combine and modify Wiseman with officially noted subject matter.***

As discussed under subsection **VII.E.1.a.**, the Examiner appears to rely on some combination of officially-noted subject matter, Wiseman, and/or US Patent 5905974 to Fraser et al. as disclosing the features of claim **47**. Regardless as to the basis for the Examiner's rejection, the alleged motivation proffered by the Examiner for combining and modifying Wiseman with alleged known features of the prior art has absolutely no basis in the references themselves, or in any other evidence of record. All factual findings of the Patent and Trademark Office must be supported by substantial evidence. Since motivation to combine and modify is a factual finding, it must be supported by some evidence. The Examiner fails to provide any evidence to support the proffered motivation to combine and modify Wiseman with alleged known features of the prior art.

Specifically, in further rejecting claim **47**, the Examiner argues:

It would have been obvious to a person of ordinary skill in the art at the time of the invention to modify Wiseman to add to receive on a passive side of a market the order for the item; and in which the trading command comprises at least one of a command to trade all of the passive side of the market, a hit command to trade down to a first price, and a lift command to trade up to a second price in



order to support a variety of trades and draw more trading customers. Final Office Action, p. 8 (emphasis added).

The Examiner's proffered motivation lacks substantial evidence within the record. The Examiner fails to cite any references or any other evidence for why a person of ordinary skill in the art would wish to selectively modify Wiseman to add "to receive on a passive side of a market the order for the item; and in which the trading command comprises at least one of a command to trade all of the passive side of the market, a hit command to trade down to a first price, and a lift command to trade up to a second price," in order to achieve the claimed invention. *Id.*

Nor is there any evidence for why a person of ordinary skill in the art would have, at the time of the invention, known or desired to combine and modify Wiseman with alleged known features of the prior art in order "to support a variety of trades and draw more trading customers," as the Examiner alleges. *Id.*

Furthermore, even if a person of skill in the art had the desire "to support a variety of trades and draw more trading customers," there is still no evidence that such a person would have sought to accomplish this goal by adding to Wiseman "to receive on a passive side of a market the order for the item; and in which the trading command comprises at least one of a command to trade all of the passive side of the market, a hit command to trade down to a first price, and a lift command to trade up to a second price," as the Examiner alleges. *Id.*

The Examiner's conclusory assertions concerning a motivation to combine and modify Wiseman with alleged known features of the prior art provide no evidence or support whatsoever. Thus, the Examiner fails to establish a *prima facie* case of obviousness of dependent claim 47. The rejection of claim 47 is thereby improper.

Since there has been no evidence offered, and no reasoning based on evidence, for a motivation to combine and modify the cited references with alleged known features of the prior art in the manner the Examiner proposes, Applicants cannot address the obviousness rejection, and moreover Applicants need not address the obviousness rejection since a *prima facie* showing of obviousness has not been made.

**F. CONCLUSION**

In view of the foregoing, Appellants submit that all of the pending claims are in proper condition for allowance, and the Board is respectfully requested to overturn the Examiner's rejection of these claims.

Respectfully submitted,

/Glen R. Farbanish/

July 21, 2009

Date

/Glen R. Farbanish/

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**VIII. CLAIMS APPENDIX**

Claims 1-37 (**Canceled**).

38. (**Previously Presented**) An apparatus comprising at least one computing device having control logic associated therewith that when executed makes the computing device operable to:

receive from a first participant an order for an item;

make the order available to at least a second participant for at least a predetermined period of time such that the second participant has the ability to trade against the order during at least the predetermined period of time;

receive from the first participant a command to cancel the order;

determine that the command to cancel is received after the predetermined period of time;

cancel the order based at least in part on determining that the command to cancel is received after the predetermined period of time;

determine that the command to cancel is received during the predetermined period of time; and

not cancel the order based at least in part on determining that the command to cancel is received during the predetermined period of time.

Claim 39-40 (**Canceled**).

41. (**Previously Presented**) The apparatus of claim 38, in which the item comprises a currency.

Claims 42-44 (**Canceled**).

45. (**Previously Presented**) The apparatus of claim 38, in which the control logic, that when executed, makes the computing device further operable to:

receive from the second participant a trading command against the order, in which the command to cancel is received during the period of time and prior to receiving the trading command; and

execute the trading command against the order.

46. (**Previously Presented**) The apparatus of claim 45, in which the order comprises at least one of:

a bid, and

an offer; and

in which the trading command comprises at least one of:

a hit of the bid, and

a lift of the offer.

47. (**Previously Presented**) The apparatus of claim 45, in which to receive the order for the item comprises to receive on a passive side of a market the order for the item; and

in which the trading command comprises at least one of:

a command to trade all of the passive side of the market,

a hit command to trade down to a first price, and

a lift command to trade up to a second price.

Claims 48-49 (**Canceled**).

50. (**Previously Presented**) The apparatus of claim 38, in which the control logic, that when executed, makes the computing device further operable to access, based at least on a type of the item, at least one parameter, in which the at least one parameter comprises a setting for the predetermined period of time.

51. (**Previously Presented**) The apparatus of claim 38, in which the control logic, that when executed, makes the computing device further operable to access, based at least on the item, at least one parameter, in which the at least one parameter comprises a setting for the predetermined period of time.

52. (**Previously Presented**) The apparatus of claim 38, in which the control logic, that when executed, makes the computing device further operable to:

- receive a second order for a second item; and
- make the second order available to at least another participant for at least a second predetermined period of time such that the another participant has the ability to trade against the second order during at least the second predetermined period of time.

53. (**Previously Presented**) The apparatus of claim 52, in which the control logic, that when executed, makes the computing device further operable to:

access, based at least on the item, at least one first parameter, in which the at least one first parameter comprises a first setting for the predetermined period of time; and

access, based at least on the second item, at least one second parameter, in which the at least one second parameter comprises a second setting for the second predetermined period of time.

54. **(Previously Presented)** The apparatus of claim 52, in which the predetermined period of time for the item is different from the second predetermined period of time for the second item.

Claim 55 **(Canceled)**.

56. **(Previously Presented)** The apparatus of claim 52, in which the control logic, that when executed, makes the computing device further operable to:

access, based at least on a type of the item, at least one first parameter, in which the at least one first parameter comprises a first setting for the predetermined period of time; and

access, based at least on a type of the second item, at least one second parameter, in which the at least one second parameter comprises a second setting for the second predetermined period of time.

57. **(Previously Presented)** The apparatus of claim 56, in which the item comprises a first type of currency and the second item comprises a second type of currency.

58. **(Previously Presented)** An apparatus comprising at least one computing device having control logic associated therewith that when executed makes the computing device operable to:

receive from a first participant an order for an item;

make the order available to at least a second participant for at least a predetermined period of time such that the second participant has the ability to trade against the order during at least the predetermined period of time;

receive from the first participant a command to cancel the order;

in response to the command to cancel, determine that the predetermined period of time has lapsed or that the predetermined period of time has not lapsed;

cancel the order based at least in part on determining that the predetermined period of time has lapsed; and

not cancel the order based at least in part on determining that the predetermined period of time has not lapsed.

59. **(Previously Presented)** The apparatus of claim 58, in which the control logic, that when executed, makes the computing device further operable to:

receive from the second participant a trading command against the order, in which the command to cancel is received during the period of time and prior to receiving the trading command; and

execute the trading command against the order.

Claims 60-61 (**Canceled**).

62. **(Previously Presented)** The apparatus of claim 58, in which the control logic, that when executed, makes the computing device further operable to access, based at least on a type of the item, at least one parameter, in which the at least one parameter comprises a setting for the predetermined period of time.

63. **(Previously Presented)** The apparatus of claim 58, in which the control logic, that when executed, makes the computing device further operable to access, based at least on the item, at least one parameter, in which the at least one parameter comprises a setting for the predetermined period of time.

64. **(Previously Presented)** The apparatus of claim 58, in which the control logic, that when executed, makes the computing device further operable to:

- receive a second order for a second item; and
- make the second order available to at least another participant for at least a second predetermined period of time such that the another participant has the ability to trade against the second order during at least the second predetermined period of time.

65. **(Previously Presented)** The apparatus of claim 64, in which the control logic, that when executed, makes the computing device further operable to:

- access, based at least on the item, at least one first parameter, in which the at least one first parameter comprises a first setting for the predetermined period of time; and



access, based at least on the second item, at least one second parameter, in which the at least one second parameter comprises a second setting for the second predetermined period of time.

66. **(Previously Presented)** The apparatus of claim 64, in which the predetermined period of time is different from the second predetermined period of time.

67. **(Previously Presented)** An apparatus comprising at least one computing device having control logic associated therewith that when executed makes the computing device operable to:

receive from a first participant an order for an item;

make the order available to at least a second participant for at least a predetermined period of time such that the second participant has the ability to trade against the order during at least the predetermined period of time;

receive from the first participant a command to cancel the order;

in response to the command to cancel, determine that the order has been made available to the at least second participant for at least the predetermined period of time or that the order has not been made available to the at least second participant for at least the predetermined period of time;

cancel the order based at least in part on determining that the order has been made available to the at least second participant for at least the predetermined period of time; and

not cancel the order based at least in part on determining that the order has not been made available to the at least second participant for at least the predetermined period of time.

68. **(Previously Presented)** The apparatus of claim 67, in which the control logic, that when executed, makes the computing device further operable to:

receive from the second participant a trading command against the order, in which the command to cancel is received during the period of time and prior to receiving the trading command; and

execute the trading command against the order.

Claims 69-70 (**Canceled**).

71. **(Previously Presented)** The apparatus of claim 67, in which the control logic, that when executed, makes the computing device further operable to access, based at least on a type of the item, at least one parameter, in which the at least one parameter comprises a setting for the predetermined period of time.

72. **(Previously Presented)** The apparatus of claim 67, in which the control logic, that when executed, makes the computing device further operable to access, based at least on the item, at least one parameter, in which the at least one parameter comprises a setting for the predetermined period of time.

73. **(Previously Presented)** The apparatus of claim 67, in which the control logic, that when executed, makes the computing device further operable to:

receive a second order for a second item; and

make the second order available to at least another participant for at least a second predetermined period of time such that the another participant has the ability to trade against the second order during at least the second predetermined period of time.

74. **(Previously Presented)** The apparatus of claim 73, in which the control logic, that when executed, makes the computing device further operable to:

access, based at least on the item, at least one first parameter, in which the at least one first parameter comprises a first setting for the predetermined period of time; and

access, based at least on the second item, at least one second parameter, in which the at least one second parameter comprises a second setting for the second predetermined period of time.

75. **(Previously Presented)** The apparatus of claim 73, in which the predetermined period of time is different from the second predetermined period of time.

**IX. EVIDENCE APPENDIX**

None

**X. RELATED PROCEEDINGS APPENDIX**

None